No. 14,682

In the

United States Court of Appeals

For the Ninth Circuit

MATTIE EDENS MEDIGOVICH,
Appellant,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Appellee.

Appellee's Brief

Appeal from the United States District Court for the District of Arizona

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STATEMENT OF THE CASE

The pertinent facts are these:

Pacific Mutual Life Insurance Company, in October of 1950, issued a group policy to one Gus R. Michaels, as Trustee for the Arizona Retail Lumber and Builders Supply Association, Inc., Trust Fund, for the purpose of offering group insurance to employees of subscribing members of the Association.

The Cottonwood Lumber Company, a family partnership, was a member of said retail lumber association, and as such, became a subscriber to the group policy in question at its inception.

On July 3, 1952, after having graduated from high school in May, Joan Medigovich applied for and was issued a certificate of insurance under the group policy, as a partner of the aforementioned Cottonwood Lumber Company.

During the three months immediately preceding the issuance of the certificate, Joan worked at the Cottonwood Lumber Company on the average of only two hours a day (R. 80, 82), mostly after school and on weekends (R. 73).

During the summer of 1952 (from July to September), Joan worked at the business on the average of aproximately half a day (R. 82).

Then on September 27, 1952, Joan left Cottonwood, Arizona to attend Stanford University in Palo Alto, California (R. 62, 74). Her attendance at Stanford was interrupted by some nervous indisposition and she returned to Cottonwood, Arizona, on November 14 or 15, at which time she was hospitalized for about a week (R. 62, 74). Consequently, she was away from the place of business for a period of nearly two months.

It is claimed that while Joan was attending college at Stanford, her parents discussed problems of the business with her by telephone and by mail (R. 67). These communications were the extent of Joan's participation and activity in the business from September 27 until late November. With respect to these communications, Appellant, Joan's mother, testified that she would have so communicated with her daughter anyway, whether she had had any interest in the business or not (R. 67).

After leaving the hospital late in November, Joan returned to work at the Cottonwood Lumber Company for the first time since her departure to Stanford in September. In January, 1953, she moved to Phoenix, Arizona, to enroll

at Arizona State College, where she planned to continue her college education. A few days later she committed suicide.

This suit was eventually brought to recover upon the group policy in question, in the amount of Five Thousand Dollars ($5,000.00). The insurance company, Appellee herein defended the action upon the ground that the policy never took effect because Joan Medigovich was not eligible for insurance in the first place, and upon the ground that even if the policy did take effect, the insurance upon her life terminated in accordance with the policy terms because of her absence from the business while at Stanford University.

After hearing the evidence and considering the Briefs of counsel, the District Court found and concluded as follows:

> "The Court finds that Joan E. Medigovich, deceased, was insured by the defendant in the amount of $5,000 effective July 3, 1952, as a partner actively engaged in the business of Cottonwood Lumber Company, a partnership. The Court finds, further, however, that Joan E. Medigovich ceased to be actively engaged in the business of Cottonwood Lumber Company on or about September 17, 1952, and that her insurance terminated thirty-one (31) days thereafter, as provided by the terms of Group Policy No. DL-2208 and Certificate No. 266 issued thereunder. Accordingly, it is ordered that the Clerk enter judgment herein in favor of the defendant and against the plaintiff."

From this judgment, the plaintiff has appealed.

SUMMARY OF ARGUMENT

The issues are twofold: the first is whether the deceased, Joan Medigovich, was eligible for insurance under the group policy. The second is whether said insurance, assum-

ing it ever became effective, was thereafter terminated by the terms of the policy.

1. The policy provides that partners of a business, if active, shall be considered employees. Assuming that deceased was an active partner, she was therefore considered an employee. The policy provides, however, that part-time employees shall not be eligible for insurance. The record shows that deceased worked at the business on a part-time basis only. The policy further provides that persons eligible for insurance must first have completed three months of full-time employment. The record, in this respect, shows that deceased worked on the average of only two hours a day during the three months prior to issuance of her certificate of insurance, as she was still attending high school during most of those three months. Consequently, although deceased may have been an active partner and therefore, an employee, she nevertheless failed to meet the requirements pertaining to employees, which we repeat are as follows:

    1. Part-time employees are not eligible for insurance; and
    2. Those eligible for insurance shall first complete three months of full-time employment.

The policy does not insure active partners per se, but only places them in the category of employees for insurance purposes, subject to all requirements stated in the policy respecting all classes of employees.

2. The policy provides that the insurance of an employee shall terminate 31 days after termination of employment, and that cessation of active work shall be deemed termination of employment. Legal decisions hold that cessation of active work occurs when a person is no longer performing substantially all of his usual duties. The record shows that

deceased was not performing and could not have performed substantially all of her usual duties during the period she was at Stanford University, which was more than 31 days.

The policy also provides that the insurance may be continued during an authorized leave of absence, at the option of the Trustee. The record, however, fails to disclose that any such option was exercised.

ARGUMENT

I. Deceased Not Eligible for Insurance

Realizing that the District Court based its judgment upon a finding that deceased's insurance, though effective in the first instance, afterwards became terminated, and consequently, that it may be unnecessary to pursue this issue further, we nevertheless feel compelled to do so for the reason that Appellant has seen fit to do so and because a judgment, sustainable on either one of two grounds, is nevertheless sustainable.

Bearing in mind that deceased was principally engaged as a high school student during the three months prior to issuance of her certificate and that during this period she averaged but two hours a day working at the business, and that even after school was over, she still only worked on a part-time basis—the question is, whether the extent of her activity in the business made her eligible for insurance under the policy.

The pertinent provisions of the policy are as follows:

> The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a Subscribing Employer, determined by conditions pertaining to employment, as are reported in writing to the Insurance Company by the Trustees; *provided, however, that part-time employees* (but not including

full-time employees temporarily working on a part-time basis) *shall not be eligible for insurance hereunder.*

If any of the Subscribing Employers is a partnership, the partners thereof shall be considered employees within the meaning of this policy if and while actively engaged in the business of the partnership.

Each present and future employee in a class of employees eligible for insurance under this policy shall become insured hereunder as follows:

(a) (Inapplicable)

(b) *immediately upon completion of three calendar months of full-time employment with a Subscribing Employer.*

In the above provisions, it is readily seen that active partners such as deceased was, do not become insurable merely because they are active partners, as Appellant contends. Being an active partner merely entitles one to be considered an employee.

It is conceded that deceased, by reason of being an active partner, was to be considered an employee. However, as an employee, and like all other classes of employees, deceased was subject to the remaining requirements before she could be eligible for insurance: she must not have been a part-time employee, which the record shows she was: and she must have completed three calendar months of full-time employment before becoming insured, which the record shows she did not do.

As Appellant points out, the policy was obviously written for employee group insurance, but made available to partners, proprietors and officers. However, we do not believe that by making said insurance available to partners, it was intended that they be excluded or exempted from the various terms, provisions and requirements of the policy.

What Appellant urges, actually, is that partners, as long as they are not silent partners, automatically become insured once and forever, and become completely immune from the terms of the policy, so long as premiums are paid. We do not believe that the language of the policy lends itself to this interpretation. From the practical view, it should be borne in mind that employee group insurance is predicated upon the risk experience of the group, and that it is contrary to sound insurance practice to insure persons who may present a different risk. We think it was contemplated that partners who devote full time to the business would present the same type of risk as full-time employees. By the same token, we hardly think that partners who do not devote full time to the business are apt to represent the risk typical of the group. The tragedy and suicide of the deceased is an ironic illustration.

In making group insurance available to partners as well as to the usual type of employee, the insurance company had the right to prescribe its own requirements and also the right to set forth and use its own definitions. It defines partners as employees, thereby subjecting them to all employee requirements. The mere fact that deceased was not, by ordinary definition, an employee, but rather a partner, does not mean that the courts may ignore policy definition and substitute different definitions and different requirements, as Appellant would have this Court do.

When a policy of insurance defines active partners as employees, for insurance purposes, and specifically places them in that category so as to subject them to the same requirements applicable to all types of employees, neither the insured nor the beneficiary can rightfully urge that these requirements do not apply merely because insured's relationship to the business was not that of an employee

as that term is ordinarily defined. There is nothing in the law which prohibits an insurer from creating and defining categories for insurance purposes, and specifying the requirements relating thereto. If the requirements are not met by a particular applicant, then he or she is not eligible.

The policy would have to be altered and tortured in order to give it Appellant's construction, which is that being an active partner in and of itself, renders one eligible for insurance, and that all other policy requirements have no application whatever. If such were true, the policy would have simply stated that "active partners are hereby insurable."

Appellant complains that the policy is not adaptable to the particular status enjoyed by deceased while a partner of the Cottonwood Lumber Company. We submit that this is no reason to distort or change the policy.

II. Deceased's Insurance Terminated 31 Days After Absenting Herself From the Business.

The evidence is undisputed that deceased left the business and went to Stanford University in September, 1952, and did not return until late November, a period of more than 31 days. It is clear that she was not actively engaged in the business during this period. It is claimed, however, that she was kept advised of major developments during her absence. This is not an unusual situation between parent and child, particularly when that child's inheritance has been invested for her in the family business. The mere fact that deceased corresponded with her mother and father about the business does not justify a finding that she remained actively at work in said business. If so, a partner or a proprietor could remain abroad for years, either on pleasure or on a totally different type of business, and

still remain insured simply by expressing interest in the affairs of the business by mail. Such was obviously not the intention of the insurer.

The undisputed fact remains that deceased was physically absent from the business from September to late November, 1952. The only question, therefore, is whether such absence, taking into consideration her continued interest by correspondence, constituted a cessation of active work so as to terminate her insurance in accordance with the provisions of the policy. The answer to this question is found in the termination clause itself and in the cases which define the term *active work*.

The termination clause in the policy provides as follows:

> "An employee's insurance under this policy shall terminate at the earliest time indicated below; * * *:
>
> (a) *The insurance of an employee shall terminate thirty-one days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment,* except that while an employee is absent on account of sickness or injury, employment shall be deemed to continue until premium payments for such employee's insurance are discontinued. At the option of the Trustees, the insurance of an employee may be continued during a temporary lay-off but not beyond the end of the policy month following the policy month in which the lay-off starts, or may be continued during an authorized leave of absence granted by a Subscribing Employer for reasons other than sickness or injury but not beyond the period ending three months after such leave of absence starts."

This gives rise to the question of what constitutes *cessation of active work*. In *Colantonio v. Equitable Life Assur. Soc. of The United States,* 100 N.E. 2d 716, cessation of

active work was deemed to occur when the employee is no longer performing substantially all of his usual duties. The same test was used in *Leach v. Metropolitan Life Ins. Co.*, 263 Pac. 784, and *Garber v. Chrysler Corporation*, 50 N.E. 2d 416.

It is obvious from the record that deceased was not, during her absence, performing substantially all of her usual duties, or at least the trial court was justified in so concluding. She therefore had ceased active work during that period, and the Court properly found that her insurance terminated after the expiration of 31 days, in accordance with the policy.

There is nothing in the record to show that the option provision was ever exercised or complied with so as to continue the insurance. Whether the option was not exercised because of inadvertence or, more logically, because it was intended that deceased would not return from college for more than three months, is of no consequence; the fact remains that the option was never exercised so as to continue the insurance, and the trial judge, sitting as the trier of facts, was justified in finding that the facts necessary to constitute an option were not sufficiently shown.

We search the record and find nothing to show that the Trustees exercised the option to continue deceased's insurance. An option is not exercised by silence, inaction, or by mere desire and intention. It requires a positive act. In *Morales v. Equitable Life Assur. Soc. of The United States*, 60 N.E. 2d 747, the court had occasion to rule on what would constitute an exercise of an option of this type under a group insurance policy. The policy provided that the insurance would terminate upon termination of employment, but that at the option of the employer, the insurance of an employee on leave of absence may be continued. The court

held that the option provision was clear and unambiguous and held that it required affirmative action on the part of the employer communicated to the insurer.

The evidence disclosed that the Trustee did not know and was not notified with respect to deceased's insurance, that she was absent from the business (R. 36). Moreover, there is no evidence that either the Trustee or the employer took affirmative action in the matter, and no evidence that any such action was communicated to the insurance company. The Court, therefore, was justified in finding that the facts essential to this or any option were lacking, and consequently, that no option was exercised.

Appellant suggests that perhaps the continued paying of premiums after deceased absented herself from the business was an exercise of the option to continue the insurance. This conclusion is foreclosed by the fact that the termination clause specifically provides under what circumstances continued payment of premiums shall operate to continue the insurance, viz., when an employee is absent on account of sickness or injury. The maxim *expressio unius exclusio alterus* renders Appellant's contention untenable.

Defendant may well have had the burden of proving that the insurance terminated, and this was sustained by proof of cessation of active work by deceased during her absence during which time she was unable to perform substantially all of her usual duties in the business. However, since it is Appellant's contention that the insurance was continued, the burden of proof was upon her to prove that the option was exercised by establishing the requisite facts. In weighing the evidence, the trial court came to the conclusion that those facts were not sufficiently established. The evidence in the case is not such as to compel a different conclusion, and therefore the conclusion of the trial court should not be

disturbed. Appellant, in effect, asks this Court now to reweigh the evidence and to draw different inferences therefrom. We do not believe that such is the function of the Appellate Court when there is sufficient evidence to support the lower Court's findings of fact.

In her Memorandum filed with the trial court, plaintiff took the position that deceased was not given a "leave of absence" but was merely absent from the business for schooling purposes. Now, in her Appellant's Brief, she takes the position that it *was* a "leave of absence". Without trying to reconcile these positions, we merely state that the result is the same in either event.

Plaintiff argues that deceased did not sever completely her relationship of partner in the Cottonwood Lumber Company. This is not denied, but it makes no difference that she remained a partner during her absence from the business, for the insurance company has the right to prescribe, as it did in this policy, what conditions of employment and activity are required, and under what conditions said insurance shall terminate.

The policy clearly and unambiguously sets forth the conditions which will operate to terminate the insurance, and once those conditions are met, as they were here, nothing short of alteration of the policy will affect the result. Such is, in effect, what Appellant urges this Court to do, principally by contending that the termination clause is ambiguous. Said clause, we submit, is not ambiguous; no interpretation is necessary, except as to the meaning of "active work" and as to what constitutes exercise of an option. These matters are succinctly defined by the authorities previously cited.

III. Regarding Appellant's Estoppel Argument.

As we understand her Brief, Appellant contends that defendant had knowledge of deceased's age, which was 17 years, and therefore should have realized that she was probably too young to be an active partner so as to qualify for insurance, and that by issuing her a certificate of insurance, defendant became estopped from afterwards questioning her eligibility and also from terminating her insurance. If there is any logic to this reasoning, then it must be because 17 year olds are per se not insurable. In other words, the underlying premise of Appellant's syllogism is that 17 year olds are not eligible for insurance. This premise is obviously without merit, since there is no age limitation or age requirement in the policy, nor is there anything inherently impossible about a 17 year old being able to meet the employment requirements of the policy.

Appellant cites the case of *John Hancock Mutual Life Ins. Co. of Boston Mass. v. Dorman,* 108 F.2d 220, to support her argument. However, the facts in that case are clearly distinguishable from those at bar. In that case, the insurance company knew at the time it issued the policy that insured received no pay for his employment, which was a specific requirement of the policy. This knowledge, the Court held constituted an estoppel against the company. In the case at bar, there is no age requirement. Also, there is no evidence that Appellee had any knowledge that deceased was only a part-time worker, and, more importantly, no knowledge that deceased quit work and went to Stanford University.

Moreover, defendant was entitled to rely upon deceased's application for insurance showing her to be a partner, and was entitled to assume that she was actively engaged in the business on a full-time basis as required by the policy; the

defendant was under no obligation to investigate her true status or to speculate that she might not be fulfilling the requirements. In *Byrnes v. Mutual Life Insurance Company of New York,* (Ariz.) 217 F.2d 497, decided by this Court last year, it was held that an insurance company has the right to rely upon an insured's representation and that it has no duty to question the veracity of the applicant and no duty to pursue in search of the true facts. This rule is based upon identical holdings in the following Arizona cases:

Greber v. Equitable Life Assur. Soc. of United States, 43 Ariz. 1, 28 P.2d 817;

American Nat. Ins. Co. v. Caldwell, 70 Ariz. 78, 216 P.2d 413;

Modern Woodmen of America v. Stevens, 70 Ariz. 232, 219 P.2d 322.

We fail to see, therefore, how Appellee's knowledge of deceased's age estops Appellee from showing, (1) that deceased was ineligible for insurance in the first place on account of not being a full-time employee, and (2) that even if eligible, her insurance nevertheless terminated thereafter on account of her departure from the business whereby she ceased to perform substantially all of her usual duties for more than 31 days.

The mere fact that premiums were paid on deceased's insurance up to the time of her death is of no consequence. The essentials of an estoppel are knowledge by the insurer of a particular fact and the assertion of some right inconsistent with its present position, resulting in prejudice to the insured who has relied on the former's conduct.

Moore v. Meyers, (Ariz.) 253 Pac. 626;

Peterson v. Hudson Ins. Co. (Ariz.) 15 P.2d 249;

Insurance Co. of America v. Williams, (Ariz.) 26 P.2d 117.

In the present case, Appellee-insurer had knowledge of insured's age only. It had no other knowledge whatever concerning her employment or subsequent departure from the business. It is therefore needless to go further and belabor the fact that Appellee at no time asserted rights inconsistent with its present position.

The trial court necessarily found that the necessary elements of estoppel were lacking, and Appellant has not demonstrated that the evidence compels a different conclusion.

CONCLUSION

With respect to the question of whether deceased was eligible for insurance, Appellee respectfully submits that the trial court erroneously concluded that she was, for the reason that there is no evidence in the record that deceased was a full-time employee having completed three months of full-time employment so as to become eligible for insurance.

With respect to the remaining questions, Appellant has failed to show that the trial court's findings are unsupported by the evidence.

This Court, as well as other appellate tribunals, has often held that it must view the evidence most favorably to Appellees and draw all inferences fairly deducible from the facts in their favor. *United States v. Aspinwall,* 96 F.2d 867.

Appellee respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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